ETHICS IN GOVERNMENT

During the 1970's, the Watergate scandal caused many persons to question the integrity of the United States government and, in particular, the wisdom of allowing the executive branch to serve as its own watchdog.[1] After considering the report of the Watergate Special Prosecution Force, the recommendations of the American Bar Association, and numerous legislative proposals,[2] Congress passed the Ethics in Government Act of 1978[3] ("Ethics Act" or "1978 Act"), which President Carter signed into law on October 26, 1978. On that date, President Carter applauded the Ethics Act in a speech, characterizing it as a law that "will not only make [government officials] honest but [that] will keep them honest" and ensure that "the public has available to them an assessment of whether or not that candidate or that public official is honest."[4] The stated purpose of the Ethics Act is to "preserve and promote the integrity of public officials and institutions," and to require investigations by the Attorney General in certain situations, particularly where allegations of wrongdoing concern the executive department.[5]

During the 1980's government ethics were again brought into the public

1. *See* Project, *White Collar Crime: Survey of Law 1988 Update*, 25 AM. CRIM. L. REV. 370, 375 (1988) (citing 1982 CONG. Q. ALMANAC, 97th Cong., 2d Sess. 386) ["Project"].

2. 123 CONG. REC. S20,956 (daily ed. June 27, 1977) (statement of Sen. Ribicoff).

3. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the United States Code) ["Ethics Act" or "1978 Act"].

4. 14 WEEKLY COMP. PRES. DOC. 43 (Oct. 26 1978).

5. S. REP. NO. 170, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4217.

spotlight with the HUD scandal, the focus on Congressional speech honoraria, and the individual scandals of certain members of the House and Senate, one of which led to the resignation of House Speaker James C. Wright, Jr. In response to the erosion of the public's confidence in the integrity of government officials, President George Bush established the President's Commission on Federal Ethics Law Reform.[6] The suggested reforms of this commission caused Congress to pass the Ethics Reform Act of 1989[7] ("Ethics Reform Act" or "Reform Act"), which amended the Ethics in Government Act of 1978. The two principal purposes of the Reform Act were: "(1) to make necessary ethics reforms, including reforms of the outside income, gift, and travel rules, and (2) to institute a pay raise for officials and employees of all branches."[8]

Already in the 1990's, ethics questions were raised surrounding the travel practices of several government officials and allegations of check bouncing and non-payment of overdue restaurant tabs by members of Congress. In a recent speech, President Bush summed up the feelings of many Americans by stating that "when Congress exempts itself from the very laws it writes for others, it strikes at its own reputation and shatters public confidence in government. . . .and creates the appearance of a privileged class of rulers. . . ."[9] A recent public opinion poll[10] showed that forty-six percent of those questioned stated that "quite a few of the people running the government were crooked" and fifty-four percent felt that the "overall level of ethics and honesty in politics has fallen over the last ten years."[11]

Since the purpose of this Note is to give an overview of the current state of federal government ethics laws, the 1978 Act will be used as the organizational foundation, and the Reform Act will be explored where it changes or adds to the 1978 Act. Titles I,[12] II,[13] and III[14] of the 1978 Act established financial disclosure requirements for specified members of the legislative, executive and judicial branches. The Reform Act, however, repeals Titles II and III and amends Title I to include all three branches.[15] This

6. Exec. Order No. 12,668, 54 Fed. Reg. 3979 (1989).

7. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 ["Ethics Reform Act" or "Reform Act"].

8. June Edmondson, *And Gifts and Travel for All*, 37 FED. B. NEWS & J. 402 (1990).

9. *Remarks by President George Bush — Smithsonian Institute*, Federal News Service, Oct. 24, 1991, at White House Briefing §. The President was referring to the Congress exempting itself from the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act of 1990 and the Age Discrimination in Employment Act.

10. Dan Balz & Richard Morin, *A Tide of Pessimism and Political Powerlessness Rises*, WASH. POST, Nov. 3, 1991, at A1.

11. *Id.* at A17.

12. Ethics in Government Act of 1978, *supra* note 3, §§ 701-709.

13. *Id.* §§ 201-211.

14. *Id.* §§ 301-309.

15. Ethics Reform Act, *supra* note 7, §§ 201-203.

combination occurred to ensure that federal ethics laws are "equitable all across the three branches of the Federal Government."[16] Title IV of the 1978 Act establishes the Office of Government Ethics within the Office of Personnel Management.[17] Title V of the 1978 Act promulgated rules pertaining to post-employment conflicts of interest,[18] but the Reform Act creates two new titles dealing with conflicts of interest.[19] Title VI of the 1978 Act sets forth a procedure requiring investigations by the Attorney General and the appointment of an independent counsel.[20] Title VII of the 1978 Act establishes the Office of Senate Legal Counsel to provide legal representation for the Senate and its members.[21] Finally, the 1992 Legislative Branch Appropriations Act,[22] passed in August of 1991, altered the honoraria rules to apply to the Senate and its employees, and made minor changes to the gift and financial disclosure provisions of the Reform Act.

I. PERSONAL FINANCIAL DISCLOSURE

Title II of the Ethics Reform Act of 1989 requires certain individuals in government to disclose their personal financial matters to the public. This disclosure occurs through the filing of a financial statement that contains specified elements. The provisions of these titles prescribe the officials who are subject to the Ethics Act of 1978 and the Ethics Reform Act of 1989, the frequency of their filings, and the contents of their statements.

A. Individuals Subject to the Act

Section 202 in Title II of the Reform Act specifies which legislative, executive and judicial branch employees and officers are subject to disclos-

16. 25 WEEKLY COMP. PRES. DOC. 1855 (Dec. 4, 1989).

17. 5 U.S.C. app. §§ 401-405 (1982 & Supp. V 1987).

18. 18 U.S.C. § 207 (1982).

19. Title I of the Reform Act, *supra* note 7, at §§ 101-102, addresses post-employment conflicts of interest, while Title VI of the Reform Act, *supra* note 7, §§ 601-603, addresses conflicts of interest that may occur when the official is still in office.

20. 28 U.S.C. §§ 592-599 (1988).

21. 2 U.S.C. §§ 288-288n (1982 & Supp. V 1987). The provisions of Title VII are outside the scope of this Survey. Congress established the Office of Senate Legal Counsel to advance other ends besides that of ethical conduct in government. Under Title VII, the responsibilities of the Counsel include instituting actions to enforce subpoenas issued by Senate committees, intervening or appearing in actions on behalf of the Senate, granting immunity from prosecution in a manner consistent with the powers of the Senate, and defending the constitutional powers and privileges of the Senate.

An important reason Congress established the Office of Senate Legal Counsel was to remove the Senate's reliance on the Justice Department for legal representation. With increased investigations into the conduct of government officials, the Senate perceived a conflict of interest in relying on an agency that was responsible for leading such investigations and under the control of the executive branch. S. REP. NO. 170, *supra* note 5, at 8-16.

22. Pub. L. No. 102-90, 105 Stat. 447 ["1992 Appropriations Act" or "1992 Act"].

ure requirements.[23] This section provides that the following people in the Executive Branch must file financial reports: the President and Vice President, candidates for those offices, executive employees compensated at or above the GS-16 level,[24] uniformed service members compensated at or above the O-7 level,[25] executive employees who are of a policymaking or confidential character and thus exempted from the competitive service, Administrative Law Judges, certain high-level Postal Service officials, the Director of the Office of Government Ethics, and persons in any other offices as the Director of Ethics may designate.[26] In general, these individuals must file their reports with the ethics officer of the agency where they work.[27] Copies of these reports must then be forwarded to the Office of Government Ethics.[28] The President and Vice President must file their reports directly with the Office of Government Ethics.[29] Candidates for the Presidency or Vice Presidency must file with the Federal Election Commission.[30]

Section 202 also directs that each member of the Senate and House of Representatives, and each congressional officer or employee who is compensated yearly at or above the GS-16 rate must file with the Clerk of the House of Representatives a report pursuant to the Reform Act.[31] In addition, when a member of Congress does not have any employees who are paid the equivalent of a GS-16 salary, the member must designate one principal assistant for filing purposes.[32] The scope of the Reform Act also extends to the Architect of the Capitol, the Botanic Gardens, the Congressional Budget Office, the Cost Accounting Standards Board, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Attending Physician, the National Commission on Air Quality, and the Office of Technology Assessment.[33]

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23. 5 U.S.C.A. app. § 101 (West Supp. 1991).

24. Compensation at the GS-16 rate, as of January 1, 1991, is a graduated pay scale ranging from an annual salary of $72,298 in the first year of service to $89,787 in the ninth year of service. *See* 5 U.S.C.A. § 5332 note (West Supp. 1991) (listing basic pay schedule).

25. Compensation at the O-7 level, as of January 1, 1991, is a graduated pay scale ranging from a monthly salary of $4,107.90 in the first year of service to $5,986.80 in the twenty-seventh year of service. *See* 5 U.S.C.A. § 5332 note (West Supp. 1991) (listing basic pay schedule).

26. 5 U.S.C.A. app. § 101(f)(1)-(7) (West Supp. 1991).

27. *Id.* app. § 103(a).

28. *Id.* app. § 103(c). Title IV of the 1978 Act establishes the Office of Government Ethics and gives its Director the power to exclude from financial disclosure employees involved in confidential policymaking work to the extent that "such exclusion would not affect adversely the integrity of the Government." Ethics in Government Act of 1978, *supra* note 3, § 201(f)(5).

29. *Id.* app. § 103(b).

30. *Id.* app. § 103(e).

31. 5 U.S.C.A. app. §§ 101(f)(9)-(10), 109(12)-(13) (West Supp. 1991).

32. *Id.* app. § 109(13)(B)(ii).

33. *Id.* app. § 109(11).

Judicial branch officers and employees are also covered by section 202 of the Reform Act and are subject to the same requirements as the Executive and Legislative branches.[34] The Reform Act defines judicial officers as the Chief Justice and Associate Justices of the Supreme Court and the judges of the United States Court of Appeals, the United States District Courts, and other specialized federal courts.[35] Judicial employees are defined to include any employee of the judicial branch who is not an officer and has adjudicatory functions or receives a salary at or above the GS-16 level.[36]

B. Frequency of Filings

Under section 202 of the Reform Act, members, officers and employees subject to the Act must file their disclosure reports by the May 15th following any year during which they performed their assigned duties for more than sixty days.[37] Any individual who assumes a position covered by the Reform Act must file a report within thirty days after taking office unless they have left another covered position in the past thirty days.[38] If the position is a presidential appointment which requires Senate approval, the appointee must file a report within five days from the time the President notifies Congress of the appointment.[39] In addition, any person covered by the Reform Act who leaves his position must file within thirty days from the date he or she stopped work, unless that person accepts another position that requires disclosure under the Reform Act.[40] The report must contain the information for the period since the last report was filed.[41] Finally, any Congressional, Presidential, or Vice Presidential candidate must file within thirty days of announcing his or her candidacy or by May 15 of that calendar year, whichever is later, but never later than thirty days before the election. Candidates must also file by May 15 for each successive calendar year they remain a candidate.[42]

C. Contents of Reports

Section 102 of Title II of the Ethics Reform Act enumerates the contents of the required financial reports.[43] The requirements are the same for all three branches.

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34. *Id.* app. § 101(f)(11)-(12) (West Supp. 1991).
35. *Id.* app. § 109(10).
36. *Id.* app. § 109(8).
37. *Id.* app. § 101(d).
38. *Id.* app. § 101(a).
39. *Id.* app. § 101(b)(1).
40. *Id.* app. § 101(e).
41. *Id.*
42. *Id.* app. § 101(c).
43. *Id.* app. § 102 (West Supp. 1991).

The financial disclosure reports required by the Reform Act have to include the "source, amount or value of income" and honoraria derived from non-government sources and totalling $200 or more.[44] The report must further specify the source of dividends, interest, rent received, and capital gains as well as the approximate values of such receipts, according to a scale containing eight categories ranging from less than $1,000 to greater than $1,000,000.[45]

The 1992 Appropriations Act amended the financial disclosure report requirements for gifts and travel reimbursements for all three branches. First, the 1992 Act merged the provisions requiring disclosure of gifts of transportation, food, lodging and entertainment with those for "other gifts."[46] The 1992 Act also replaces the disclosure aggregate figures of $100 (for other gifts) and $250 (for gifts of food, lodging, transportation, or entertainment) with a "minimal value" standard of $250 or the amount set out in the Foreign Gifts Act,[47] whichever is greater.[48] Secondly, the previous disclosure threshold of $250 for travel reimbursements was similarly replaced with the "minimal value" standard.[49] Finally, any gift with a fair market value of $100 or less (as adjusted by the Foreign Gifts Act) need not be aggregated for disclosure purposes.[50]

The Reform Act does not limit the contents of the financial report to a summary of income related items, but also requires an extensive description of assets and liabilities.[51] For example, a covered individual must report the value category and type of interest in any investment or business related property whose value is greater than $1,000.[52] The report must also identify and state the value category of liabilities to any non-relative creditors totalling more than $10,000, but not including any secured personal residence mortgages, and certain secured loans.[53] Except for the case of an individual's personal residence, the disclosure must include a description and the value category for any sale, purchase or exchange of real property or of securities.[54]

The financial disclosures mandated by the Act also encompass all posi-

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44. *Id.* app. § 102(a)(1)(A).
45. *Id.* app. § 102(a)(1)(B).
46. 1992 Appropriations Act, *supra* note 22, § 314(a)(3) (to be codified as 5 U.S.C.A. app. 6 § 102(a)(2)(A)).
47. 5 U.S.C.A. § 7342(a)(5).
48. 1992 Appropriations Act, *supra* note 22, § 314(a)(4) (to be codified at 5 U.S.C.A. app. 6 § 102(a)(2)(B)).
49. *Id.* § 314(a)(4) (to be codified at 5 U.S.C.A. app. 6 § 102(a)(2)(B)).
50. *Id.* § 314(a)(3) (to be codified at 5 U.S.C.A. app. § 102(a)(2)(A)).
51. 5 U.S.C.A. app. § 102(a)(3)-(5).
52. *Id.* app. § 102(a)(3).
53. *Id.* app. § 102(a)(4).
54. *Id.* app. § 102(a)(5).

tions held "on or before the date of filing during the current calendar year as an officer, director, trustee, partner, proprietor, representative, employee or consultant of any corporation, company, firm, partnership, or other business enterprise, any non-profit" or educational organization or any non-governmental institution.[55] Honorary positions, and positions in religious, social and political groups need not be reported.

In addition to the information that the covered government employee must report, he or she must also disclose much of the same information, subject to certain enumerated exceptions, regarding his or her spouse or dependent children.[56]

A significant part of the financial disclosure sections of the Reform Act is devoted to defining the major exception to the reporting requirements. This exception, known as a qualified blind trust, allows a reporting individual to withhold disclosure of assets by placing them beyond his control and knowledge.[57] A qualified blind trust operates as an arrangement in which the trustee is independent of and beyond the control and influence of any interested party; has not been a partner or employee of any interested party; and is not related to an interested party.[58] Furthermore, the trustee must not communicate with an interested party regarding the control of the trust assets, and must not disclose the yearly tax return on trust assets to any interested party.[59]

Although an individual need not report the income from or holdings of a qualified blind trust, he must obtain approval prior to the formation of such a trust from his supervising ethics office.[60] At that time, the official must file a list of the assets placed in the trust.[61] In the event that a blind trust is dissolved, the individual must, within thirty days, file a report listing the assets contained in the trust at the time of its termination.[62]

The combined result of the disclosure requirements applicable to blind trusts is to limit significantly the ability of a reporting individual to "hide" assets from public scrutiny. Furthermore, the Reform Act empowers the Attorney General to file a civil suit against an individual who willfully or negligently falsifies or fails to file any required information regarding blind

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55. *Id.* app. § 102(a)(6).

56. For the Reform Act's specific requirements with regard to dependent children and spouses, *see Id.* app. § 102(e) (West Supp. 1991).

57. *Id.* app. § 102(f)(2)(A).

58. *Id.* app. § 102(f)(3)(A).

59. *Id.* app. § 102(f)(3)(C)(i). *But see Id.* app. § 102(f)(3)(C)(vi) (under narrowly defined circumstances trustee and interested party may communicate).

60. *Id.* app. § 102(f)(3)(D).

61. *Id.* app. § 102(f)(5)(A)(ii). Even if the ethics office finds that a qualified blind trust was established prior to the enactment of the Ethics in Government Act of 1978, the reporting party is required to file a list of assets originally placed in the trust. *Id.* app. § 102(f)(7).

62. *Id.* app. § 102(f)(5)(C)(ii).

trusts.[63]

The Reform Act also provides a mechanism for enforcing Title II by empowering the Attorney General to file a civil action and allowing imposition of fines up to $10,000 for willful falsification of information, or willful failure to disclose.[64] The financial statements filed by government workers covered by the Act are also available for public inspection at reasonable hours.[65] However, they may not be used for unlawful purposes, for commercial purposes (other than by news services), for credit rating determinations, or for solicitation of contributions.[66]

II. JUDICIAL INTERPRETATION OF THE DISCLOSURE REQUIREMENTS

Members of the judiciary challenged the constitutionality of the financial disclosure provisions soon after the Ethics in Government Act of 1978 took effect. In *Duplantier v. United States*,[67] six federal judges filed a class action suit to enjoin enforcement of the Act.[68] The judges claimed that the 1978 Act violated the doctrine of separation of powers, unconstitutionally diminished their compensation, violated their privacy rights, and violated their constitutionally guaranteed right to equal protection.[69]

The Fifth Circuit Court of Appeals recognized that financial disclosure requirements could subject judges to certain pressures, but reiterated that "the separation of powers doctrine does not require 'three airtight departments of government.' "[70] Since Congress has the authority to compel judges to disqualify themselves from cases due to financial interests, forcing a judge to disclose those interests is a permissible prerequisite to asserting that authority.[71]

The court in *Duplantier* also stated that the 1978 Act's penalty provision for failure to file financial reports did not constitute an unconstitutional diminishing of judges' salaries. Where factual diminutions in salary are nondiscriminatory and indirect, they are not contrary to Article III of the Constitution.[72] Accordingly, since the 1978 Act covers both legislative and executive officials, the penalties levied against the judges do not operate as unconstitutionally discriminatory political weapons.

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63. *Id.* app. § 102(f)(6)(C).
64. *Id.* app. § 104(a).
65. *Id.* app. § 105(a), (b).
66. *Id.* app. § 105(c)(1).
67. 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).
68. *Id.* at 660.
69. *Id.* at 666.
70. *Id.* at 667 (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977)).
71. *Id.* at 668 (citing 28 U.S.C. § 455(a), (b)(4) (1982)).
72. *See* Atkins v. United States, 556 F.2d 1028, 1051 (Ct. Cl. 1977) (decreases in salary caused by inflation not unconstitutional), *cert. denied*, 434 U.S. 1009 (1978).

With regard to the plaintiffs' privacy claim, the *Duplantier* court noted that judges have chosen careers in public office, and although not elected, they share the same responsibilities and face the same sorts of privacy limitations as elected officials.[73] Furthermore, the court stressed that the purpose of the 1978 Act was, in part, to maintain the credibility of public servants. Upon balancing these competing concerns, the court upheld the legislative determination that the importance of public confidence in government outweighed the confidentiality interests of individual judges.[74] Finally, the court quickly dispensed with the claim that the Act violated the equal protection clause by requiring judges to file financial reports while not imposing a similar duty on other citizens. According to the court, maintaining the integrity of the federal government provides a rational basis for requiring only certain federal officials (including judges) to disclose financial information.[75]

Although *Duplantier* firmly established the constitutionality of the filing requirements under the Ethics Act, it said little about the use of the reports and the extent of the punishment for omitted or fraudulent filings. In *United States v. Hansen*,[76] the District of Columbia Circuit Court held that penalties for improper compliance with the Act could be even more severe than those stated, insofar as the Act does not preclude criminal punishment for fraudulent filing. Circuit Judge Scalia, writing for the court, stated that the criminal sanctions imposed by section 1001 of Title 18 were concurrently applicable to Ethics Act violations.[77] The opinion makes clear that because criminal penalties for fraudulent filings existed prior to the Act, Congress was not required to include them in subsequent legislation.

In *Hansen*, the appellant claimed that the court could find that section 1001 did not apply to Ethics Act violations without finding that Congress had implicitly repealed the section. The appellant reasoned that since there were no financial disclosure requirements prior to the passage of the Ethics Act, there could have been no criminal penalties for fraudulent disclosure,

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73. Duplantier v. United States, 606 F.2d at 670.

74. *Id.* at 670-71. The court found instructive a previous Fifth Circuit decision which recognized the privacy implications of Florida's disclosure statute yet concluded, nonetheless, that any such influence does not rise to the level of a constitutional violation. *Id.* at 669-70 (citing Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979)). Individuals have, on the whole, received very little constitutional protection concerning freedom from divulging personal financial information to the public or government. *Id.* at 671 (quoting O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977)); *see also* Buckley v. Valeo, 424 U.S. 1, 66-68 (1976) (financial disclosure is permissible method of instilling confidence in government and preventing impropriety).

75. Duplantier v. United States, 606 F.2d at 672-73.

76. 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

77. *Id.* at 943. § 1001 provides for a fine not to exceed $10,000 or imprisonment of not more than five years (or both) for anyone who intentionally uses a false document or makes false statements "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001 (1988 & Supp. I 1989).

section 1001 notwithstanding.[78] Noting that the Fifth Circuit established a presumption against the implied repeal of law, the court quickly rejected the appellant's argument as unduly restrictive of Congress' ability to develop law. The court held that section 1001 was concurrently applicable with the Ethics Act because Congress did not expressly supersede the section.[79] In so holding, the court reiterated the theory that the presumption against implied repeal is based on the idea that "Congress 'legislates with knowledge of former related statutes' . . . and will expressly designate the provisions whose application it wishes to suspend rather than leave that consequence to the uncertainties of implication."[80] Furthermore, the court recognized an implied "harmony" between the penalty provisions contained in the Ethics Act and in section 1001: "[T]hose who intentionally fail to file . . . are subject only to the civil sanction of [the Ethics Act], while those who lie on their forms are additionally subject to the criminal penalty of § 1001."[81]

The court in *Hansen* also discussed the issue of good faith reliance. Section 105 of the 1978 Ethics Act provides that designated congressional committees may issue advisory opinions interpreting the Act.[82] The Act further states that individuals who act in good faith reliance on such opinions in factually identical situations will not be held liable for the sanctions "in this chapter."[83] The *Hansen* court stated that "it can hardly be thought that Congress meant the advisory opinion to be a protection against the civil sanctions . . . but not against the criminal penalties of 18 U.S.C. § 1001."[84] As a result, the court expanded the words "in this chapter" to include the provisions of section 1001.

Despite the clear holdings of *Duplantier* and *Hansen*, some members of the federal Judiciary have still been reluctant to comply with the financial disclosure requirements. It was estimated that forty-six federal judges and top court officials (out of the approximately 2,500 covered by the ethics law) failed to meet the May 15, 1991 deadline for the filing of 1990 financial disclosure reports.[85] Despite the possibility of a $200 late fee penalty[86]

78. United States v. Hansen, 772 F.2d at 944.

79. *Id.* at 944-45.

80. *Id.* (quoting Continental Ins. Co. v. Simpson, 8 F.2d 439, 442 (4th Cir. 1925)); *see* Red Rock v. Henry, 106 U.S. 596, 601 (1882) (requiring "irreconcilable conflict" as textual evidence of implicit repeal).

81. United States v. Hansen, 772 F.2d at 945.

82. Ethics in Government Act of 1978, *supra* note 3, § 105(b). This provision was left intact by the Ethics Reform Act of 1989. 5 U.S.C.A. app. 6 § 106(b)(7) (West Supp. 1991).

83. Ethics in Government Act of 1978, *supra* note 3, § 105(b). This provision is included in the Ethics Reform Act of 1989. 5 U.S.C.A. app. 6 § 106(b)(7) (West Supp. 1991).

84. United States v. Hansen, 772 F.2d at 947.

85. Garry Sturgess, *Some Judges Fail to Report Ethics Data*, N.J. L.J., Aug. 29, 1991, at 4.

86. 5 U.S.C.A. app. § 104(d) (West Supp. 1991).

and a stiff fine for failure to file,[87] several members of the Judicial branch apparently view the law as "an invasion into their personal privacy" and chose not to comply with this "very unpopular requirement that Congress has imposed on the federal judiciary."[88] Comparatively, all 535 members of Congress and nearly all of the 1,100 Senate-confirmed political appointees filed on time.[89]

Another financial disclosure issue that has engendered considerable controversy concerns the extent to which the required statements may be used after they have been filed. A number of cases have involved members of Congress who have claimed that their financial statements may not be used in evidence against them, or even inquired into, because of the protections granted under the speech and debate clause of the Constitution.[90] However, the courts have categorically held that financial disclosures are not part of the legislature's deliberative and communicative processes, and therefore fall outside the protection of the speech and debate clause.[91]

III. GIFTS AND TRAVEL

Although the Ethics in Government Act of 1978 made no mention of gifts and travel provided by private sources, new gift and travel rules were one of the main purposes of the Ethics Reform Act of 1989.[92] Before the Reform Act, there was a large discrepancy between gift and travel rules of the three branches. The Reform Act intended to make these rules uniform across all three branches.[93]

A. Gifts

Prior to the passage of the Reform Act, the Executive Branch had very strict regulations which effectively prohibited officers and employees from accepting gifts and travel from non-Federal sources.[94] Section 303 of the

87. *Id.* § 104(a).

88. Sturgess, *supra* note 85, at 30. The author was quoting Judge Julian Cook, Jr., Chairman of the Judicial Conference of the United States' Committee on Judicial Ethics.

89. *Id.* at 4.

90. U.S. CONST. art. I, § 6 ("for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place").

91. *See, e.g.*, United States v. Hansen, 566 F. Supp. 162, 169 (D.D.C. 1983) (financial disclosure is not legislative activity and thus may be subject of inquiry); United States v. Myers, 692 F.2d 823, 849 (2d Cir. 1982) (financial disclosure was properly admitted as evidence at bribery trial), *cert. denied*, 461 U.S. 961 (1983).

92. Edmondson, *supra* note 8, at 402.

93. 25 WEEKLY COMP. PRES. DOC. 1855 (Dec. 4, 1989). The Ethics Reform Act was geared mainly towards the Executive and Legislative Branches because "federal judges are subject to strict ethical standards that forbid the acceptance of any gift from a donor whose interests have come or are likely to come before the judge." Edmondson, *supra* note 8, at 403.

94. Executive Order 11,222, 3 C.F.R. § 306 § 201(a) (1964-1965 compilation).

Ethics Reform Act established a uniform gift rule prescribing the conditions under which members, officers or employees of the three branches could accept gifts from the private sector. "It prohibited all branches from soliciting or accepting 'anything of value' from a person seeking official action, doing business with, or conducting activities regulated by the individual's employing agency, subject to such reasonable exceptions issued by each supervising ethics office."[95] The Office of Government Ethics is expected to define "anything of value" for the Executive Branch by a dollar limit.[96]

For the purposes of the Reform Act, the House of Representatives and the Senate each were defined as a supervising ethics office for their body.[97] As a result, they are empowered to write rules to enact this federal statute.[98] The House set out its rules in Title VIII[99] of the Reform Act while the Senate set its out in Title IX.[100]

With the passage of the 1992 Appropriations Act, the House and Senate rules regarding the acceptance of gifts were amended to create uniform guidelines for both Houses. Effective January 1, 1992, the new rules prohibit a member, employee or officer of either House from accepting gifts aggregating more than a "minimal value" from any person in a calendar year.[101] Several exceptions to the rule exist. Gifts with a fair market value lower than $100 or the amount set in the Foreign Gifts Act (raised from $75) are not aggregated to the annual limit.[102] Gifts from relatives are excluded,[103] as are "gifts of food and beverages consumed not in connection with gifts of lodging."[104]

The Senate's rules had differed, in some respects, from those of the House prior to the passage of the 1992 Act. The Senate rules had distinguished between gifts from sources with a direct interest in legislation and other sources. This distinction was eliminated,[105] and the aggregate value

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95. 135 Cong. Rec. S15,956 (daily ed. Nov. 17, 1989) (statement of Sen. Levin) (as quoted in Edmondson, *supra* note 8, at 403).

96. Edmondson, *supra* note 8, at 403.

97. 5 U.S.C.A. § 7353(d)(1)(A), (d)(1)(B) (West Supp. 1991).

98. *Id.* § 7353(b)(1).

99. Standards of Conduct of the U.S. House of Representatives, Rule XLIII (4), *reprinted in* Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives (House Ethics Manual), 100th Cong., 1st Sess. 193 ["House Rules"]. These rules were amended by the Ethics Reform Act of 1989, *supra* note 7, § 801, and by the 1992 Appropriations Act, *supra* note 22.

100. 2 U.S.C.A. § 31-2 (West Supp. 1991).

101. 1992 Appropriations Act, *supra* note 22, § 314(c)-(d) (amending House Rules, *supra* note 99, at XLIII (4) and 2 U.S.C.A. §31-2(a)). *See supra* notes 47-49 and corresponding text for an explanation of "minimal value."

102. 1992 Appropriations Act, *supra* note 22, § 314(c)(4), (d)(1).

103. *Id.*

104. 2 U.S.C.A. § 29d note (West Supp. 1991).

105. 1992 Appropriations Act, *supra* note 22, § 314(c)(1) (amending 2 U.S.C.A. § 31-2(1)).

of acceptable gifts from any source was lowered from $300,[106] by the 1992 Act.

B. Travel

The Ethics Reform Act again tries to achieve parity between the three federal branches by extending travel opportunities to the Executive Branch which were previously prohibited. Section 302 of the Reform Act provides that officers and employees of the Executive Branch (and their spouses) may accept payment from non-Federal sources for travel and expenses if the individual is acting in a function relating to his official duties.[107] This rule is subject, however, to any restrictions established by the Administrator of General Services, in consultation with the Director of the Office of Government Ethics.[108]

The Ethics Reform Act made minor changes to the legislative branch since House and Senate members or staff persons were already allowed to accept payment of travel and expenses for an event in which they were participating.[109] The Reform Act only established limits on the number of days for which travel expenses could be paid. The House placed the limit at four consecutive days for domestic travel and seven consecutive days for foreign travel,[110] while the Senate placed it at three days (two nights) for domestic travel and seven days (six nights) for foreign travel.[111] These limits also apply to the official's spouse.[112]

Recently, some members of the Executive Branch have been criticized for taking advantage of the newly relaxed travel restrictions. Most notably, White House Chief of Staff John Sununu was scrutinized throughout the Summer of 1991 for his use of military and corporate jets.[113] Similarly, Secretary of Commerce Robert A. Mosbacher received much press attention for traveling on corporate and private jets owned by "former business associates, rich GOP contributors, and companies that stand to benefit" from issues the Department handles.[114] While it was eventually found that Governor Sununu had not violated any laws,[115] restrictions were placed on

106. *Id.* § 314(c)(3).

107. 31 U.S.C.A. § 1353(a) (West Supp. 1991).

108. *Id.*

109. Edmondson, *supra* note 8, at 404.

110. Ethics Reform Act, *supra* note 7, § 805.

111. 2 U.S.C.A. § 31-2(b) (West Supp. 1990).

112. Ethics Reform Act, *supra* note 7, § 805(a)(2); 2 U.S.C.A. § 31-2(b) (West Supp. 1990).

113. *See, e.g.*, James Gerstenzang, *Bush Advisers Say Sununu Can Survive Furor*, L.A. TIMES, June 24, 1991, at A1 (documenting Gov. Sununu's problems).

114. Dana Priest, *Mosbacher Flies the Corporate Skies — Free*, WASH. POST, May 5, 1991, at A24.

115. *See* Michael Wines, *Bush Voices His Support and Respect for Sununu*, N.Y. TIMES, July 2, 1991, at A12 (President Bush quoted as saying "no laws hav[e] been violated"); *Memo to Governor Sununu from C. Borden Gray, Counsel to the President, May 9, 1991*, Federal News Service, White

his future travel.

Predictably, these "abuses" were not limited to members of the Executive Branch. Also in the summer of 1991, several members of Congress were scrutinized for their use of military jets for trips which mixed official and personal business. Receiving substantial criticism was Rep. Les Aspin (D - Wisc.), Chairman of the House Armed Services Committee, who, as a committee chairman, had the power to approve his own travel requests.[116] Many other instances of abuse, involving several other members of Congress, have also been documented.[117]

The public reaction to these travel practices is useful to illustrate a major objective behind the enactment of gift and travel restrictions, specifically, and Ethics Reform legislation in general: the elimination of an appearance of impropriety.[118] A concern of all public officials is the public perception of governmental action. Upon signing the Ethics Reform Act of 1989, President Bush restated his belief that public officials should "act with the utmost integrity and warrant the public's confidence."[119] Indeed, a major concern of the President during the Sununu controversy was the creation of "an appearance problem," and Gov. Sununu himself acknowledged an "appearance of improprieties."[120] A poll taken in July of 1991 showed that seventy-five per cent of those questioned felt that Gov. Sununu had "done something wrong."[121]

Of course, it is not the purpose of this note to pass upon the "guilt" or "innocence" of any of these public officials. However, the public response to these recent events indicates a potential for change in this area of the law. Numerous editorials were written stating that if the acceptance of corporate flights and the use of military jets for quasi-personal business were within the law, then the law is flawed.[122] Interest groups, such as the "gov-

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House Briefing §, May 9, 1991 (summarizing the findings of the internal investigation).

116. Charles R. Babcock, *Aspin's Military Flights Mix Personal, Official Business*, WASH. POST, July 24, 1991, at A1.

117. *See, e.g. id.* (saying "Aspin's use of military planes. . .is not unique" and citing Pentagon records showing that Members and their staff took about 500 flights on military planes from May 1990 - May 1991); Howard Kurtz, *Too Much Sununu News? Post Said to Ignore Democrats' Abuses*, WASH. POST, June 28, 1991, at D1 (citing alleged abuses by several members of Congress); Paul M. Rodriguez, *Others Get Plane Deal, Too*, WASH. TIMES, May 6, 1991, at A1 (same).

118. *See* Beth Nolan, *Regulating Government Ethics: When It's Not Enough to Just Say No (Foreword, Ethics in Government Symposium)*, 58 GEO. WASH. L. REV. 405, 408 n.23 (1990) (discussing the "appearance of impropriety" standard).

119. 25 WEEKLY COMP. PRES. DOC. 1855 (Dec. 4, 1989) (statement on signing the Reform Act).

120. Gerstenzang, *supra* note 113.

121. *World News Tonight With Peter Jennings* (ABC news television broadcast, July 2, 1991).

122. *See, e.g.*, Editorial, *Legal Travel? Then It's a Rotten Law*, N.Y. TIMES, July 1, 1991, at A12 (stating that the regulations in the Executive branch "widened the potential for abuse" and urging abolishing the acceptance of corporate flights); Editorial, *Playing by Bad Rules; One Way to Avoid Sununu's Appearance of Conflict: Change the Law*, L.A. TIMES, June 20, 1991, at B6 (appearance

ernment ethics watchdog group," Common Cause, have urged President Bush to propose tougher travel rules.[123]

Alternatively, one may hold the view that there is no abuse committed when such corporate or military flights are taken. Commerce officials stated that without the acceptance of corporate flights, the Department's limited budget would impede its ability to carry out its important mission. The result would be fewer accomplishments at a higher cost to the taxpayer.[124] Rep. Aspin released a statement saying that "only trips on which substantial official business is conducted are made at government expense. I maintain a full schedule of varied kinds of work . . . in Washington [and] when I travel."[125]

However, it seems unlikely that travel will be restricted in the Executive Branch unless it is similarly restricted for members of Congress. As noted earlier,[126] the Executive Branch was under more stringent regulations before the Reform Act. It is unlikely that such recent changes will be hastily abandoned. Also, given the fact that the legislature has traditionally enjoyed liberal travel privileges,[127] reform is even more unlikely. Nevertheless, if enough public pressure mounts, changes remain possible.

IV. CONFLICTS OF INTEREST

Title V of the Ethics in Government Act of 1978 attempted to promote the integrity of public service by prohibiting post-employment conflicts of interest for members of the Executive Branch.[128] The Ethics Reform Act divides conflicts of interest into two separate titles: the first deals with post-employment conflicts,[129] while the other addresses problems arising from conflicts which may arise during the official's employment with the government.[130]

Title V of the 1978 Act, which was incorporated into the 1989 Reform Act, disqualifies former officers or employees of the Executive Branch and independent agencies from involvement in certain private sector activi-

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problem can be avoided by making such travels illegal, "as they once wisely were"); Kurtz, *supra* note 113 (describing newspaper editorials by 45 different papers within a week, most of them critical of Sununu); Editorial, *Misused Flights*, S.F. CHRONICLE, July 26, 1991, at A24 (criticizing Aspin and Sununu).

123. *Common Cause Chief Urges Bush to Act on Travel Abuses*, L.A. TIMES, June 30, 1991, at B6.

124. Priest, *supra* note 114.

125. Babcock, *supra* note 116.

126. *Supra* notes 94, 95.

127. Edmondson, *supra* note 8, at 405.

128. Ethics in Government Act of 1978, *supra* note 3, §§ 501-503.

129. Ethics Reform Act of 1989, *supra* note 7, tit. I, §§ 101-102, (codified in 18 U.S.C.A. § 207 (West Supp. 1990)).

130. Ethics Reform Act of 1989, *supra* note 7, tit. VI, §§ 601-603, (codified in 5 U.S.C.A. app. §§501-505 (West Supp. 1991) and 26 U.S.C.A. app. § 7701 (West Supp. 1991)).

ties.[131] They are not allowed to represent, or attempt to exert influence on behalf of any person in any proceeding in which the United States or the District of Columbia has an interest, and in which the former employee participated "personally and substantially" during the period of government service.[132] This prohibition is permanent and applies to actions before any department, agency, or court which are in connection with any "proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation . . . or other particular matter."[133]

If the proceeding in question was not personally and substantially handled by the former employee, but rather was "actually pending under his official responsibility . . . within a period of one year prior to the termination of such responsibility," that former employee is disqualified from involvement for a period of two years.[134]

The Ethics Reform Act, while leaving the above provisions intact, also creates new restrictions of its own. It establishes a one-year ban on former senior personnel[135] in the Executive Branch from representing any person in any matter that was under their authority within the year prior to their termination.[136] A restriction is also placed on very senior executive personnel[137] from having any contact with their former agency or any other Executive Level official in the Executive Branch.[138] Also, in yet another attempt to create parity across all three branches of federal government, the Ethics Reform Act extends post-employment restrictions to the legislative branch.[139] Former members, officers and employees of the legislative branch are prohibited from lobbying any current member, officer or employee of either House of Congress.[140] Any violation of these provisions may now be prosecuted by the Attorney General in either a civil or a criminal action.[141]

An attempt to pass procurement integrity reform legislation in the First

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131. 18 U.S.C.A. § 207 (West Supp. 1990).

132. 18 U.S.C.A. § 207(a) (West Supp. 1990); *see also* CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1576 (Fed. Cir. 1983) (prohibitions are triggered only when activities are of same particular matter in which person had participated personally and substantially).

133. 18 U.S.C.A. § 207(a)(1), (2) (West Supp. 1990).

134. *Id.* § 207(b).

135. Senior personnel include those receiving pay at a rate equal to or in excess of the GS-17 level or, for members of the uniformed services, equal to or above the O-7 level. 18 U.S.C.A. § 207(c)(2) (West Supp. 1990).

136. 18 U.S.C.A. § 207(c) (West Supp. 1990).

137. "Very senior personnel" is defined to encompass Executive Level I officials and Executive Level II officials serving in the White House, the Executive Office of the President, or the Office of the Vice President. 18 U.S.C.A. § 207(d)(1) (West Supp. 1990).

138. 18 U.S.C.A. § 207(d) (West Supp. 1990).

139. *Id.* § 207(e).

140. *Id.*

141. *Id.* § 216.

Session of the 102d Congress failed.[142] The impetus behind such legislation is to simplify various executive department-dependent statutes with the Executive Branch wide provisions recently modified in the Ethics Reform Act.[143] Provisions to implement these reforms were dropped during conference on the 1992-93 Defense Appropriations bill.[144] There will be another attempt to pass procurement integrity reform in the Second Session.[145]

Title VI of the Reform Act limited outside earned income for certain members of the federal government and completely banned the acceptance of honoraria.[146] Outside earned income was limited to fifteen percent of an Executive Level II's salary for all officials compensated at or above the GS-16 level.[147] Additionally, the personal receipt of honoraria by virtually all members of the three branches was abolished.[148] The Senate was not subject to these restrictions.[149] Violations of these provisions may be prosecuted by the Attorney General in a civil action for which the penalty may not exceed $10,000.[150]

The 1992 Appropriations Act corrected what many saw as the major flaw in the Reform Act — the inapplicability of the honorarium ban to the Senate and its officers and employees. Under the 1992 Act, members of the Senate received the pay raises given to members in the House under the Reform Act.[151] Additionally, the Senate and its officers and employees will be subject to the outright ban on honoraria and the limitations on outside income.[152]

Two other loopholes were also closed by the 1992 Act. First, the defini-

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142. *Government Contracts, Conyers Plans To Offer Procurement Integrity Legislation Next Year*, Daily Rep. For Executives (BNA) No. 240, at A-3 (Dec. 13, 1991). Opposition by the Pentagon was the reason that the procurement integrity provision was dropped in conference. *Id.*

143. *Government Contracts, Senate Approves Comprehensive Rewrite Of Procurement Ethics Laws*, Daily Rep. For Executives (BNA) No. 151, at A-2 (Aug. 6, 1991). The Senate Bill, sponsored by Senator Carl Levin, was offered as an amendment to the 1992-93 defense authorization bill, S. 1507. *Id.*

144. *Government Contracts, Conference Approves FY '92 DOD Bill, Drops Procurement Integrity Provision*, Daily Rep. For Executives (BNA) No. 221, at A-21 (Nov. 15, 1991).

145. *Government Contracts, Conyers Plans To Offer Procurement Integrity Legislation Next Year*, Daily Rep. For Executives (BNA) No. 240, at A-3 (Dec. 13, 1991). Rep. Nicholas Marvoules (D-Mass.). joined by House Energy and Commerce Committee Chairman John Dingell (D-Mich.), introduced H.R. 4003 on Nov. 26, 1991, which represented "the House's 'best and final offer' in the [defense authorization] conference negotiations." *Id.*

146. Ethics Reform Act, *supra* note 7, § 601, codified at 5 U.S.C.A. app. §§ 501-505 (West Supp. 1991).

147. 5 U.S.C.A. app. § 501(a) (West Supp. 1991).

148. *Id.* § 501(b). Honorarium was defined as a "payment of money or anything of value for an appearance, speech or article by a member, officer or employee of one of the three branches. *Id.* app. § 505(3).

149. *Id.* § 505(1)-(2).

150. *Id.* § 504(a).

151. 1992 Appropriations Act, *supra* note 22, § 601(a), (codified at 5 U.S.C.A. § 5318 note).

152. *Id.* § 6(b) (to be codified at 5 U.S.C.A. §§ 503(1)(b), 505(1)-(2)).

tion of honorarium was amended to include the payment for "a series of appearances, speeches or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government" (a stipend payment).[153] Secondly, Senators will no longer be able to obtain tax benefits from the donation of honoraria to charity. Under the Reform Act, honoraria which would have otherwise been payable to a member of the House, or officers and employees of the Government covered by the Act, could instead be paid to a charitable organization on behalf of the member, with limited exceptions.[154] Under applicable tax law,[155] the donating individual was treated as if he or she never received the honorarium, thus no tax deduction was permissible. Since the Senate was not subject to these provisions, its members were able to derive tax benefits from such contributions, while other Government employees (including members of the House) were not. The 1992 Act removed this distinction.[156]

A partial rollback passed the House but died in the Senate.[157] Renewed activity to lift the honoraria ban with respect to certain categories of federal employees is expected in the Second Session of the 102d Congress, with an uncertain prospect for passage.[158]

V. JUDICIAL INTERPRETATION OF THE HONORARIUM BAN

The application of an outright ban on receipt of honoraria to virtually all employees of the federal government (except, at the time, to members of the Senate and their employees) led to several Constitutional challenges by affected employees. The National Treasury Employees Union, the American Federation of Government Employees and several individuals compensated below the GS-16 level brought suit to preliminarily enjoin the enforcement of Title VI of the Reform Act, which went into effect on January 1, 1991. These three suits were consolidated into one action.[159]

The plaintiffs in *National Treasury* raised several Constitutional claims; primarily, they argued that the ban violated their First Amendment rights.[160] The Court of Appeals for the D.C. Circuit, in an opinion by Judge (now Justice) Clarence Thomas, affirmed the district court's denial

153. *Id.* § 314(c) (to be codified at 5 U.S.C.A. § 505).

154. 5 U.S.C.A. app. § 501(c). The payment could not exceed $2,000 or be made to an organization from which a relative of the donor may derive any financial benefit.

155. 26 U.S.C.A. § 7701(k).

156. 1992 Appropriations Act, *supra* note 22, § 314(e) (to be codified at 26 U.S.C.A. § 7701(k)).

157. *Id.*

158. Mike Causey, *What's Ahead in Congress*, WASH. POST, Jan. 6, 1992, at B2.

159. National Treasury Employees Union v. United States, 927 F.2d 1253 (D.C. Cir. 1991).

160. *Id.* at 1254. Other grounds for challenge were vagueness, overbreadth, equal protection, and due process. These claims were not considered by the court in the ruling on preliminary relief. *Id.*

of preliminary relief after finding that the plaintiffs had not demonstrated that they would suffer irreparable injury if the enforcement of the ban was not enjoined.[161]

In addressing appellants' First Amendment claim, the court noted that a government employee was entitled, under the terms of the Act, to "all of the necessary expenses" incurred during the exercise of his or her First Amendment rights. Expenses such as "travel expenses," "typing, editing and reproduction costs," "meals" and "attendance fees" are covered by the terms of the Act and the regulations promulgated pursuant to the Act.[162] Therefore, even though the ban may in the long run reduce or eliminate the willingness of such employees to pursue First Amendment activities, "foreseeable long-term effects do not entitle appellants to preliminary, injunctive relief."[163]

The Court suggested that appellants have the honorarium paid to charity or into escrow. If the money were to be put in escrow, the appellants could recover any honorarium paid into the account if their Constitutional claim is successful. If they are unsuccessful, they would not be able to collect the money, because they would not have been "entitled to the compensation in the first place."[164] At the time of this writing, the case is still pending.

Also at the time of this writing, legislation is pending in Congress which would lift the honoraria ban for certain lower-level government employees.[165] Under these proposals, federal workers at or below a certain level of compensation (possibly GS-15) would be able to accept payment for speeches or articles if the subject of the work is unrelated to the official's duties, the payment is unrelated to the employee's federal position, and the funds aren't received from a group which may be affected by the employee's exercise of his or her official duties.[166]

VI. JUDICIAL INTERPRETATION OF TITLE V OF THE 1978 ACT[167]

The exact extent of involvement prohibited by the 1978 Ethics Act conflict of interest provisions has been defined by a series of key cases. In

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161. *Id.* at 1256.

162. *Id.* at 1255 (quoting 5 U.S.C.A. app. § 505(3) and 56 Fed. Reg. 1721-30 (1991) (to be codified at 5 C.F.R. § 2636.101-.307)).

163. *Id.* at 1256.

164. *Id.*

165. H.R. 325, 102d Cong., 1st Sess. (1991); S. 242, 102d Cong., 1st Sess. (1991).

166. *Id. See also* Bill McAllister, *Bill Would Relax Rules on Honoraria; Most Federal Workers would be Affected,* WASH. POST, Sept. 13, 1991, at A23 (describing the proposals).

167. There have been no cases litigating the Ethics Reform Act conflict of interest provisions because they did not come into effect until January 1, 1991. 18 U.S.C.A. § 207 note (West Supp. 1990) and 2 U.S.C.A. § 31-1 note (West Supp. 1990).

United States v. Dorfman,[168] defendant Thomas P. Sullivan, a United States Attorney, indicated upon entering public service that he would recuse himself from matters involving Mr. Dorfman, a client of his private sector law firm. During his service in the Department of Justice, Sullivan consistently executed written recusals in matters dealing with Dorfman, and although his name was inadvertently placed on documents related to the Dorfman proceedings, he was never personally involved in the matters. The central issue in the case was whether Sullivan, by formally recusing himself, could avoid the 1978 Act disqualification provisions and appear as counsel for Dorfman after returning to private practice. The United States District Court in Illinois noted that while the "personal and substantial" language in the statute allows recusal to prevent permanent disqualification, such recusal has no effect on the two year disqualification from matters that were actually pending under the individual's official responsibility.[169] To hold otherwise would allow outgoing United States Attorneys to "selectively recuse themselves from particular matters actually pending under their official responsibility enabling them to participate directly in those matters a year hence."[170] Activity of this sort would present the very appearance of impropriety which the Ethics Act strives to prevent.[171] Accordingly, Sullivan was barred from representing Dorfman in the case in question.

An Air Force Reserve officer's conviction under Title V of the 1978 Act was the issue in *United States v. Schaltenbrand*.[172] Schaltenbrand was convicted of violating 18 U.S.C § 207(a), which "prohibits former government employees from representing private parties on matters in which they previously worked for the government,"[173] and 18 U.S.C. § 208(a), which "prohibits government employees from working on a project in which they have a financial interest."[174]

Schaltenbrand served on active and inactive duty, accruing either pay or retirement credit, to assist in the sale of military aircraft to foreign governments.[175] Schaltenbrand attended a meeting in his Air Force role where a defense contractor, seeking a contract to support a sale to Mexico, made a presentation.[176] Schaltenbrand was personally involved in the Air Force's sale to Mexico, and he solicited the representative of the defense contractor

168. 542 F. Supp. 402 (N.D. Ill. 1982).
169. *Id.* at 408-09.
170. *Id.* at 409-10.
171. *Id.* at 410 (citing S. REP. No. 170, *supra* note 5, at 32).
172. 930 F.2d 1554 (11th Cir.), *cert. denied*, 112 S. Ct. 640 (1991).
173. *Id.* at 1556.
174. *Id.*
175. *Id.*
176. *Id.*

to determine if they would be interested in employing him on this project after his Air Force service ended. This led to the submission of an employment application, an interview and ultimately employment on the project.[177] Shortly after accepting employment, Schaltenbrand attended a meeting with the Air Force on the Mexican sale, and discussed delivery schedules but was not a principal representative of the defense contractor at this meeting.[178]

Section 207(a) prohibits former Executive Branch officers from "knowingly acting 'as agent or attorney for, or otherwise represent[ing], any other person (except the United States), in any formal or informal appearance before' any department of the United States in connection with any contract in which the employee participated personally and substantially while employed by the government."[179] Schaltenbrand's indictment charged only that he "did act as an agent"[180] and failed to allege that he otherwise represented the contractor.[181] The court's analysis of agency law led to the conclusion that there was insufficient evidence to support a finding that Schaltenbrand acted as his employer's agent and reversed his section 207(a) conviction.[182]

Schaltenbrand's defense to the section 208(a) conviction was dependent upon a finding that his contacts with the defense contractor were not a "negotiation" within the meaning of Title V of the 1978 Act.[183] The Eleventh Circuit panel adopted a broad definition of the word "negotiate," declining to adopt the defendant's formalistic offer/counter-offer/ acceptance construction, instead giving it the ordinary meaning of discussions with an interest in reaching agreement.[184]

In another case, *United States v. Coleman*,[185] the Third Circuit addressed the extent of the activities prohibited by the disqualification provisions. Coleman had worked at the Internal Revenue Service and had been the most experienced "nonsupervisory Revenue Officer" in his regional office.[186] Within one year of leaving the IRS, Coleman attended meetings

177. *Id.* at 1557.

178. *Id.* at 1558.

179. *Id.* at 1560 (citing 18 U.S.C. § 207(a)).

180. *Id.*

181. *Id.* In *United States v. Schaltenbrand*, 922 F.2d 1565 (11th Cir.), *vacated*, 930 F.2d 1554 (11th Cir. 1991), the court reached the issue of "otherwise represented", because the defense that the indictment was defective was not raised. The court there found that Schaltenbrand's activities in the meeting constituted an "appearance" before the government where he did in fact "otherwise represent" his new employer. *Id.*

182. 930 F.2d at 1560-61.

183. *Id.* at 1559.

184. *Id.* at 1560.

185. 805 F.2d 474 (3d Cir. 1986); *see* Project, *supra* note 1, at 373 (discussing United States v. Coleman).

186. United States v. Coleman, 805 F.2d at 477.

between an IRS official and his new private sector clients concerning matters which had been his personal responsibility during his prior government service.[187] Coleman contended that since he made no statements at one meeting and only a brief comment at two other meetings, his conduct did not constitute representation within the meaning of section 207(b)(i) of the 1978 Ethics Act. The Third Circuit, however, affirmed Coleman's conviction, and broadly interpreted the term "otherwise represents" to include appearances "in any professional capacity" which might even appear improper.[188] Under the holding in *Coleman*, any involvement by a former official within the time periods specified in the 1978 Act will most likely be deemed a violation of the conflict of interest law.

VII. TITLE VI: INDEPENDENT COUNSEL

As a new generation of scandal has emerged in American politics, the legacy of Watergate remains pervasive in our system today. Some of the safeguard mechanisms established in the immediate post-Watergate period have gained considerable strength only recently. One such mechanism that has flourished in this new generation is the Office of the Independent Counsel.

The following section will examine the independent counsel statute which is scheduled to expire in 1992. Part A. will outline the main provisions of the statute and summarize the procedure for the statute's operation. Part B. will briefly examine instances in which the statute has been invoked. Specifically, Independent Counsel Lawrence Walsh's prosecution of the Iran-Contra Affair will be considered. Finally, Part C. will discuss recent criticism and proposed changes of the statute. Included in this discussion will be the statute's prospects for reauthorization in 1992.

A. Statutory Provisions and Procedure

After President Nixon fired Watergate special prosecutor Archibald Cox in the middle of the Watergate investigation, Congress determined that an independent prosecutor outside the Executive Branch was needed to investigate and prosecute top executive officials suspected of criminal conduct. Consequently, the independent counsel statute was created as part of the 1978 Ethics in Government Act.[189]

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187. *Id.*

188. *Id.* at 480.

189. 28 U.S.C. §§ 591-99 (1988). Title VI of the 1978 Ethics Act provides for the establishment of the special prosecutor. The term "special prosecutor" was changed to "independent counsel" in the 1983 reauthorization of the statute. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983). The statute was again reauthorized in 1987. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) ["Reauthorization Act"].

The statute is triggered when the Attorney General receives information that certain individuals covered by the statute have violated a non-petty federal criminal law.[190] After receiving this information,[191] the Attorney General must determine within fifteen days whether a preliminary investigation of the matter should be conducted.[192] The Attorney General is permitted to consider only the specificity of the information and the credibility of the source in making this determination.[193] If the Attorney General finds the information specific and credible or cannot make such a determination within fifteen days, then the Attorney General must commence a preliminary investigation.[194]

The Attorney General must conduct the preliminary investigation within ninety days.[195] If the Attorney General determines that no further investigation is warranted, he must so notify the Independent Counsel Division of the Court of Appeals.[196] Such a determination ends the investigation, and no independent counsel is appointed.[197] If, however, the Attorney General has not notified the court within ninety days or the Attorney General concludes that further investigation is warranted, he must apply to the special division for the appointment of an independent counsel.[198]

The special division then appoints an independent counsel and defines the independent counsel's jurisdiction.[199] The special division also has the au-

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190. 28 U.S.C. § 591(a). The statute applies to the President, Vice President, high ranking executive office personnel, principal national campaign officers for the President, and high ranking officials in the Department of Justice, Central Intelligence Agency, and the Internal Revenue Service.

191. Anyone, including private citizens, can present this information to the Attorney General. S.REP. No. 123, 100th Cong., 1st Sess. 3 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2150, 2152.

192. 28 U.S.C. § 591(d)(2).

193. *Id.* § 591(d)(1).

194. *Id.* § 591(d)(2). If, however, the Attorney General determines that the information is not specific or credible, the Attorney General can close the case. The Attorney General's decision not to conduct a preliminary investigation is not subject to judicial review. In re Inslaw, 885 F.2d 880, 882-83 (D.C. Cir. 1989); Dellums v. Smith, 797 F.2d 817, 822-23 (9th Cir. 1986); Banzhaf v. Smith, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984).

195. 28 U.S.C. § 592(a). When the investigation is initiated as a result of a congressional request under § 592(g), the Attorney General must complete the preliminary investigation within ninety days of receiving the congressional request. In other words, the Attorney General has 105 total days of investigation after original receipt of the information unless the information comes from Congress in which case the Attorney General has only 90 total days to investigate.

196. 28 U.S.C. § 592(b)(1). The Independent Counsel Division of the Court of Appeals for the Distict of Columbia is assigned the duty of appointing the independent counsel and is composed of three judges designated by the Chief Justice of the United States Supreme Court to serve for a term of two years. 28 U.S.C. § 49.

197. *Id.* § 592(f). This section prohibits judicial review of the Attorney General's decision to apply to the court for appointment of an independent counsel. This section has also been interpreted to hold that the Attorney General's decision not to seek appointment is not subject to judicial review. In re Inslaw, 885 F.2d at 883.

198. 28 U.S.C. § 592(c).

199. *Id.* § 593(b).

thority to disclose to the public the identity and jurisdiction of the independent counsel if the court determines that disclosure is in the best interests of justice.[200] The special division also has the authority to expand the jurisdiction of the independent counsel, but it can do so only upon the request of the Attorney General.[201]

The Attorney General may remove the independent counsel from office only for good cause.[202] Otherwise the independent counsel is terminated when either the special division or the independent counsel determines that the investigation is completed.[203]

The independent counsel statute was reauthorized with several amendments in 1983 and 1987.[204] The current statute is scheduled to expire on December 15, 1992.[205]

B. Use of the Statute

Independent counsels have been appointed at least eleven times since the creation of the statute in 1978.[206] Nine of these appointments have been made public while at least two appointments by the special division have not been disclosed.[207] Two independent counsel investigations are ongoing at the time of this writing.[208]

The investigation into the Iran-Contra Affair conducted by Lawrence E. Walsh has by far been the most expensive and time consuming investigation to date. The investigation has been ongoing since December 1986, and the expenditures reached $27.6 million as of August 31, 1991.[209] Walsh's investigation has resulted in the convictions of ten individuals involved in the scandal.[210] The conviction of Walsh's main target, Oliver North, however, was vacated on appeal,[211] and Walsh recently dropped all charges

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200. *Id.* § 593(b)(4).

201. *Id.* § 593(c).

202. *Id.* § 596(a)(1).

203. *Id.* § 596(c).

204. *See* Reauthorization Act, *supra* note 189.

205. 28 U.S.C. § 599.

206. H.R. REP. No. 316, 100th Cong., 1st Sess. 14-19 (1987) [HOUSE REPORT]. On March 2, 1990, Arlin Adams was appointed independent counsel to investigate allegations of criminal activities at the Department of Housing & Urban Development (HUD). *Retired Judge Named HUD Investigator*, CHI. TRIB., March 3, 1990, § 1, at 4.

207. HOUSE REPORT, *supra* note 206, at 19.

208. Lawrence Walsh's investigation of the Iran-Contra Affair and the HUD investigation each have trials pending.

209. OFFICE OF INDEPENDENT COUNSEL, OCTOBER 1991 FACT SHEET 1 (1991) ["FACT SHEET"].

210. *Id.* at 1-2. The convictions of John Poindexter and Thomas Clines are presently on appeal. In addition, Clair George was indicted on September 12, 1991, on ten counts of perjury, false statements and obstruction of justice.

211. United States v. North, 920 F.2d 940, 941-42 (D.C. Cir. 1990) (extending Kastigar requirements to testimony of witnesses exposed to defendant's immunized testimony).

against North.[212]

With the dismissal of the case against North, criticism of the independent counsel mechanism has resurfaced with renewed strength. Not surprisingly, most of the criticism has been directed at the time and cost of the investigation.[213] The investigation, which has at times employed over fifty attorneys,[214] has recently switched its emphasis toward the alleged CIA coverup of the Iran-Contra Affair.[215] With the recent indictment of former CIA official, Clair George, Walsh's investigation is not likely to end in the near future.

In addition to the $27.6 million expended to date by Walsh's office, the Departments of Justice and Treasury have reportedly spent over $9 million in the course of the prosecution.[216] Opponents of the independent counsel argue that these costs outweigh the benefits resulting from the convictions. These opponents note that none of the defendants were convicted of the crimes for which the investigation and prosecution were started, namely the illegal sale of arms to Iran and the diversion of funds to the Contras. In addition, opponents refer to the lack of any substantial punishment as evidence that the prosecution was a failure.[217]

The disagreement over the success or failure of the Iran-Contra prosecution stems from a disagreement over the measure of benefits it has produced. Judge Walsh has stated that, "Punishment is not the critical factor;" rather it is that "the rule of law is established."[218] One assistant in Walsh's office said he "exulted" in the success of the original North verdict.[219] He concluded that the jury had convicted North of three serious offenses - "lying, cheating, and stealing."[220] One is left wondering, however, whether North and the other defendants could not have been convicted of lying, cheating and stealing through the normal channels of prosecution. It is very possible that if left to the discretion of the Justice

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212. United States v. North, Crim. No. 88-0080-02-GAG, 1991 U.S. Dist. LEXIS 12714 (D.D.C. September, 16, 1991) (order granting government's motion to dismiss charges against North).

213. For a strong criticism of the independent counsel mechanism, *see generally*, TERRY EASTLAND, ETHICS, POLITICS AND THE INDEPENDENT COUNSEL (1989).

214. Fred Strasser, *Iran-Contra Scorecard; The End is in Sight for Probe*, NAT'L L.J., May 27, 1991, at 1. As of October 1991, Walsh's office employed 7 full-time attorneys and 31 support staff. FACT SHEET, *supra* note 209, at 1.

215. Ronald J. Ostrow, *Iran-Contra Probe Seen Gaining Steam as Key Answers Appear About to Emerge*, L.A. TIMES, Sept. 21, 1991, at A21.

216. Strasser, *supra* note 214, at 32.

217. Thomas Clines received the most severe sentence, 16 months in prison, for underreporting and falsifying tax returns. His conviction is currently on appeal. FACT SHEET, *supra* note 209, at 1.

218. Lee Michael Katz, *Iran-Contra Affair; Public Knows Why We're Investigating*, USA TODAY, June 28, 1990, at A3.

219. JEFFREY TOOBIN, OPENING ARGUMENTS: A YOUNG LAWYER'S FIRST CASE, U.S. v. OLIVER NORTH 344 (1991).

220. *Id.*

Department, these individuals would not have been charged at all.

The adequacy of normal prosecutorial channels is at the heart of the independent counsel debate. Can the Executive Branch effectively and honestly investigate and prosecute wrongdoers within its ranks? Can an independent counsel do any better? These questions remain largely unanswered after the Iran-Contra Affair. The answers to these questions and the future of the independent counsel may very well be determined by the current investigation of the HUD scandal by independent counsel Arlin Adams.[221] A resounding success may ensure a permanent place in our system for the independent counsel, while a costly prosecution resulting in insignificant convictions could endanger the independent counsel.

VIII. COMMENTARY

The future of the independent counsel may be settled determined before the HUD scandal prosecution is concluded. Independent Counsel Arlin Adams' office has been investigating the scandal for more than a year and a half, and it is presently not known when the investigation might be expected to end. It is also not known when Congress will take action on the reauthorization of the statute. Complicating the entire matter of reauthorization is the fact that the statute is due to expire one month after a presidential election.

A brief look at the legislative history of the 1987 Reauthorization Act might lead one to believe that the independent counsel is not an issue likely to stir great debate on the Hill.[222] There are, however, hurdles on the track. The time and cost of independent counsel probes has already been discussed. Opponents may find this to be a potent argument in 1992 as the recession and the issue of governmental waste are at the forefront of the American Agenda. A recent poll indicated that Americans believe that the government wastes 49 cents of every tax dollar it collects.[223] Opponents will undoubtedly point to the $27.6 million spent in the Iran-Contra prosecution as an example of waste. Even though this argument carries strong

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221. The special division appointed Arlin Adams in March 1990 to investigate allegations of illegal favoritism against former HUD Secretary Samuel Pierce. The investigation so far has led to the indictment of Leonard Briscoe, a Florida developer, on charges of conspiracy and fraud. Lance Wilson, a former vice president at PaineWebber, is expected to be indicted on similar charges in the near future. Patrice Hill, *Ex-Bond Dealer Wilson Expected to be Indicted in HUD Scandal*, THE BOND BUYER, Sept. 11, 1991, at 1.

222. The 1987 Reauthorization Act passed both houses of Congress by substantial margins. 133 CONG. REC. S33081, H33728 (1987). Although President Reagan expressed doubts about the statute's constitutionality, he signed the bill into law. Statement by President Reagan upon signing H.R. 2939, 23 WEEKLY COMP. PRES. DOC. 1526 (Dec. 21, 1987). Shortly thereafter, the Supreme Court held that the statute was indeed constitutional. Morrison v. Olson, 487 U.S. 654 (1988).

223. Balz & Morin, *supra* note 10, at A16 (citing an October 1991 WASH. POST-ABC News survey).

political overtones, it does not present a real barrier to reauthorization. Debate over cost and waste may, however, lead Congress to amend the statute in order to make independent counsel investigations more efficient.[224] It is not clear how these investigations can be made more cost effective. Congress may add language to give the appearance of waste reduction.[225]

Another potential obstacle in the way of reauthorization is the White House. The Bush Administration and the Democratically controlled Congress have battled on many occasions throughout the President's first term. With the 1992 election looming large in the near future, the battle has intensified, and President Bush has recently tried to shift blame for the country's domestic problems to the Congress.

The President is likely to demand several changes in the independent counsel statute before he will sign its reauthorization. Although the Administration might prefer to scrap the independent counsel statute altogether, such a position could be a political liability considering the public's growing distrust of government officials. A straight veto threat would surely be exploited by the Democrats who would claim the President is trying to place himself above the law.

President Bush may, however, use the veto threat and strong political rhetoric to effect certain changes in the law. Considering the President's current veto record, such a tactic could be very successful.[226] The most significant change the Administration is likely to demand is the extension of the independent counsel to Congress.[227] President Bush has recently called Congress "a privileged class of rulers who stand above the law,"[228] and he has repeated his challenge to Congress that it subject itself to its own laws. In the wake of bouncing checks, fixing parking tickets and walk-

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224. Representative William Broomfield has introduced a bill that would place a two-year limit on independent counsel investigations. To date the bill has only twenty-four cosponsors, and it is not likely to get past the House Judiciary Committee. 137 CONG. REC. H83, H6940 (1991).

225. The 1987 Reauthorization Act included an amendment requiring the special division to appoint an independent counsel who will conduct the investigation in a prompt, responsible, and cost-effective manner. 28 U.S.C. § 593(b)(2). *See also*, H.R. CONF. REP. NO. 452, 100th Cong., 1st Sess. 23-25 (1987) (discussing Conference agreement on amended language).

226. To date, Bush has vetoed twenty-three bills passed by Congress, and none of the vetoes have been overridden. Eric Pianin, *Senate Fails to Override Jobless Veto; Once Again Bush Thwarts Democrats*, WASH. POST, Oct. 17, 1991, at A1.

227. President Bush recommended this change to Congress in 1989, but Congress failed to include it in the 1989 Reform Act. White House Fact Sheet on the President's Ethics Reform Proposals, 25 WEEKLY COMP. PRES. DOC. 529 (Apr. 12, 1989) [President's Proposals]. A rule promulgated by Attorney General Edwin Meese, which established an independent counsel to investigate members of Congress, was suspended by Attorney General Richard Thornburgh in 1989. 54 FED. REG. 15752 (1989).

228. Bush specifically chided Congress for exempting itself from laws covering discrimination, minimum wage and overtime, and conflict of interest. Gaylord Shaw, *Bush Says Congress Puts Self Above Law*, NEWSDAY, Oct. 25, 1991, at 4.

ing out on restaurant bills,[229] members of Congress may be hard pressed to reject - in an election year - the extension of the independent counsel to themselves.

The Administration may also urge changes to limit the power of the independent counsel. One recommendation President Bush has already proposed is the creation of a pool of fifteen individuals from which the special division can choose an independent cousel.[230] The proposal, however, provides that this pool be chosen by the Attorney General. Thus the proposal creates the same conflict of interest problems which the statute was designed to avoid. The President may also recommend that more power be returned to the Executive Branch in order to avoid political abuse of the independent counsel mechanism.[231] According to *Morrison*, however, such a power shift is not constitutionally required.[232] Finally, the Administration may propose time and spending limits on independent counsel prosecutions.

If political corruption and waste continue to be major issues as the '92 campaign develops, the reauthorization of the independent counsel statute could cause quite a controversy in Washington. After the election, however, the independent counsel standing in its original form with a few exceptions and the addition of a new category of persons covered by the statute - members of Congress.

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229. David E. Rosenbaum, *Public Calls Lawmakers Corrupt and Pampered*, N.Y. TIMES, Oct. 10, 1991, at B17.

230. President's Proposals, *supra* note 227, at 529.

231. *See*, L. Gordon Crovitz, *Ethics v. Politics; Congress v. the Executive Branch*, THE HERITAGE LECTURES, NO. 195 (1989) (claiming that Congress uses independent counsel to criminalize policy differences).

232. Morrison v. Olson, 487 U.S. 654 (1988) (discussed above *supra* note 222).